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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

STEVIN NOEL FAITH,

Defendant and Appellant.

C053653

(Super. Ct. No.  
074214)

In 1981, a jury convicted defendant Stevin Noel Faith of the first degree murder of Deborah Cox. A federal writ of habeas corpus issued and a retrial was held in 2006. This time, the jury acquitted defendant of first degree murder but convicted him of murder in the second degree. The trial court sentenced defendant to a term of 15 years to life.

On appeal, defendant contends that (1) statements of the victim were erroneously admitted, (2) one expert witness impermissibly vouched for another, (3) the admission of a photograph of the victim and her child was unduly prejudicial, (4) the court erred in refusing to instruct on an alternative

theory of involuntary manslaughter, and (5) the cumulative effect of these multiple errors compels reversal. We affirm the judgment.

#### FACTS AND PROCEEDINGS

In December 1980, defendant met Debbie Cox, the victim, in a bar. He took her to a house that he knew was unoccupied, engaged in sexual activity with her, and strangled her.

At trial, witnesses described defendant's behavior on the days surrounding the murder, the inconsistent statements he had given about events (including whether or not he knew the victim), and incriminating remarks he had made. On various occasions, defendant had told friends of his fantasy of raping and killing women.

Forensic evidence disclosed that the victim had a blood alcohol level of .23 percent, and she had engaged in anal sex. Two pathologists testifying for the prosecution described in detail the injuries inflicted to the victim's neck, and they asserted that the cause of death was asphyxiation associated with manual strangulation. These pathologists discounted other possible causes of death, including a blow to the neck or asphyxiation from aspiration of stomach contents.

Defendant denied killing the victim. He asserted that the victim had picked him up at the bar and the two went to the unoccupied house, where they engaged in consensual sex. When he left, the victim was passed out or sleeping. He found the

victim dead in the house when he returned there the next morning.

A pathologist testifying for the defense stated that the victim asphyxiated by aspirating stomach contents and that the death was accidental. This pathologist criticized the opinions of the prosecution's experts and pointed out that some typical indications of manual strangulation were absent. He believed the injuries to the neck were more consistent with a nonfatal blow to the neck. Defendant stated that while it was possible that he grabbed the victim's neck or throat during sex, he did not think he did so hard enough to hurt her. The pathologist also believed that the lack of trauma indicated that the victim had engaged in consensual anal sex.

In rebuttal, another pathologist critiqued the opinions of the defense pathologist and explained why he found them unconvincing. This pathologist agreed with the findings of the other two pathologists who had testified for the prosecution.

The jury acquitted defendant of first degree murder but convicted him of murder in the second degree. The court sentenced defendant to a prison term of 15 years to life, and this appeal followed.

## DISCUSSION

### I

#### *Admissibility of Victim's Statements*

Defendant contends that the trial court erred in permitting evidence relating to the victim's purported sexual preferences. Any error was harmless.

One of the witnesses at trial was the victim's aunt, Peggy F. Peggy was only one year older than the victim and the two had been best friends. Over defendant's objection, Peggy described an incident that occurred shortly before the victim got married. The women were looking at a sex manual and when they got to a page about anal sex, they "were both going, oh, my god, you know, no way. It's bad enough to have a bowel movement without somebody sticking . . . ." The prosecutor asked Peggy whether she had an opinion about whether the victim would have engaged in consensual anal intercourse. Peggy replied: "No, she wouldn't. Debbie was--really she was more straight laced than me. We were both very sheltered, raised in Christian homes." Peggy said the two had conversations about sex over the subsequent years, had talked about anal sex, and had said "we didn't want it."

The trial court permitted this testimony, apparently under the provisions of Evidence Code section 1103, subdivision (a). That statute provides that "evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of

the crime for which the defendant is being prosecuted is not made inadmissible by [the general ban against character evidence] if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [¶] (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1)."

Defendant contends that this statute was inapplicable because the evidence was not being offered by the prosecution to rebut character evidence that defendant had adduced.

The prosecutor presented Peggy's testimony in its case-in-chief. Defendant had not yet presented any evidence about the victim's character, and defense counsel repeatedly stated that he had no intention of doing so. Because no such evidence had been introduced, there was nothing for the prosecutor to rebut, and the provisions of Evidence Code section 1103, subdivision (a)(2) did not, at that point, come into play. It was therefore error to admit, *at that point in the trial*, Peggy's testimony regarding the victim's aversion to anal intercourse. Even so, because in this matter there has been no miscarriage of justice, we will not reverse the judgment in the trial court based on this error.

Article VI, section 13 of the California Constitution provides in part: "No judgment shall be set aside . . . in any cause, on the ground of . . . the improper admission . . . of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of

justice." For the reasons that follow, we find no miscarriage of justice here.

To frame our discussion, a brief recitation of the somewhat unusual procedural aspects of the presentation of the People's case will be helpful.

As noted earlier, defendant was originally tried for the murder of Debbie Cox in 1981. The case now before us was a retrial of the original charges undertaken after the federal court issued a writ of habeas corpus. Defendant testified in his own defense during the 1981 trial.

In this case, the prosecution was permitted to read into evidence during its case-in-chief the direct examination testimony of the defendant given at his first trial. That testimony included claims by the defendant that he and the victim engaged in consensual anal intercourse but that he had not killed her. Defendant's credibility--the believability of his denial that he killed Debbie Cox--was thereby, and at the time of the reading of his prior testimony, placed in issue. Arguably, if the prosecution could show that defendant lied about the act of consensual anal sex when he testified in the earlier trial, that would tend to prove that he also lied about not having killed her, suggesting that in fact he was guilty of the murder. Thus the victim's claimed consent to an act of anal intercourse became an issue in the case.

As noted earlier, Evidence Code section 1103, subdivision (b) allows for the admissibility of character evidence when it is "[o]ffered by the prosecution to rebut evidence adduced by

the defendant . . . ." (Evid. Code, § 1103, subd. (a)(2).) "Character evidence" has been defined as "an emotional, mental, or personality fact constituting a disposition or propensity to engage in a certain type of conduct." (2 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 2008) Evidence of Character, Habit and Custom, § 33.1, p. 732.) Thus, once defendant presented evidence (through his testimony in the first trial) that the victim consented to anal intercourse, the prosecution's evidence concerning the victim's apparent aversion to anal intercourse would have been admissible pursuant to Evidence Code section 1103, subdivision (a)(2).

We recognize that, at the time the aunt testified to the victim's state of mind regarding anal sex, the consensual or non-consensual nature of that act on the night in question had not technically become an issue in the case because the prosecution did not read the defendant's prior testimony into the record until after the aunt testified. But this is of no particular moment. Done by the book, at most, the aunt would initially have testified only to other matters and then would have been recalled to testify to the victim's views about anal intercourse after the defendant's testimony was read into the record. Ultimately, the testimony would have become admissible.

We observe also that Evidence Code section 1250 provides that evidence of a statement of a declarant's then existing state of mind is not made inadmissible by the hearsay rule if it is offered to prove the declarant's state of mind when that state of mind is an issue in the action. As noted, the victim's

consent to anal intercourse became an issue in the case and hearsay testimony to the effect that she would never have consented to such sexual activity showed her state of mind on that issue and was evidence in turn that, contrary to defendant's claims, she had not consented to the act. This then would have been a second basis for admitting the testimony. And, once again, the timing of the presentation of the prosecution's "rebuttal" evidence, under the circumstances presented here, is of no particular significance.

Given all of the above, the court's error in admitting this evidence apparently pursuant to Evidence Code section 1103, subdivision (a) was harmless under any standard (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711]; *People v. Watson* (1956) 46 Cal.2d 818, 836) and did not result in a miscarriage of justice.

Lastly, regarding this testimony, defendant also argues that its admission violated his "federal constitution right to confrontation" citing for some support *Idaho v. Wright* (1990) 497 U.S. 805, 814-815 [111 L.Ed.2d 638, 651-652]. *Wright* was a case that dealt with Idaho's "residual hearsay exception" and the Court found that, applying the holding in *Ohio v. Roberts* (1980) 448 U.S. 56 [65 L.Ed.2d 597], application of that exception to the facts of that case violated the Confrontation Clause of the United States Constitution. Defendant does not develop the argument further.

We consider only those arguments sufficiently developed to be cognizable. (*People v. Freeman* (1994) 8 Cal.4th 450, 482, fn.

2.) "To the extent defendant perfunctorily asserts other claims, without development and, indeed, without a clear indication that they are intended to be discrete contentions, they are not properly made, and are rejected on that basis." (*Ibid.*)

We note that the victim's testimony concerning anal intercourse was not "testimonial" as that term is used in *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] and thus *Crawford* has no application here.

## II

### *Testimony of Expert Witness*

Defendant contends that one prosecution expert witness impermissibly vouched for another.

Two pathologists, including Dr. Joseph Masters, testified as expert witnesses in the prosecution's case-in-chief and described the cause of death as asphyxia associated with manual strangulation. Defendant presented the contrary testimony of another pathologist, Dr. John Cooper, who opined that the victim died from aspirating stomach contents.

In rebuttal, another pathologist, Dr. Tom Resk, concurred with the findings of the prosecution's other pathologists. When asked about Dr. Master's reputation in the community, Dr. Resk responded, "Dr. Masters, among the forensic community, is considered--essentially equivalent to a John F. Kennedy in terms of his integrity, competence and ability. For younger folks in the jury, probably that don't know about John F. Kennedy, don't

have the same feeling, probably better to think of Dr. Masters as Obi Wan Kenobi . . . in Star [Wars]." He concluded that Dr. Masters "basically is a very competent individual," and stated that when Dr. Masters determined that certain physical findings were present, "[y]ou can bank on it."

Defense counsel objected to Dr. Resk's testimony comparing Dr. Masters to President Kennedy and Obi Wan Kenobi, asserting that this testimony constituted "inadmissible vouching for the credibility of another prosecution witness." The court responded, "It cuts both ways. It may tend to show that he would have the tendency to rely too much on Dr. Masters' testimony and give it too much weight. If you want the jury admonished to disregard it, I am happy to do that." Defense counsel responded, "That's what I am asking for, Your Honor. Thank you."

When the prosecutor voiced concerns, the court stated, "I am just saying that [Dr. Resk] can indicate that he puts credence in what Dr. Masters said without comparing him to John F. Kennedy. He's already said it. I would be toning it down a little bit." The court added, "He can testify that he places great weight on Dr. Masters' opinions because of his great respect for Dr. Masters personally."

After further comments, defense counsel cautioned, "[W]hat I see coming is [the prosecutor] asking Dr. Resk [about] his knowledge of Dr. Cooper's reputation." The prosecutor replied, "I don't intend to." The court asked, "Can we leave it at that?"

We will leave the testimony in, and I won't comment on it with the jury." Defense counsel did not say anything in response.

On appeal, defendant renews his claim that Dr. Resk's comparison of Dr. Masters to President Kennedy and Obi Wan Kenobi constituted impermissible vouching for another expert witness. Defendant has forfeited any claim of error.

Generally, an appellate court will not consider matters where an objection that could have been made was not presented to the trial court. These circumstances may involve intentional acts or acquiescence constituting waiver or estoppel, but often it is simply a matter of fairness: a party should not be permitted to take advantage of an error that could have been easily corrected at the trial level. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590; *In re Dakota S.* (2000) 85 Cal.App.4th 494, 501.)

That is precisely the case here. The trial court had expressed its willingness to admonish the jury to ignore Dr. Resk's comparisons. After more discussion, the court asked if it could leave the matter as it stood, without saying anything more to the jury, and defense counsel did not respond. This acquiescence forfeits any claim of error on appeal. There is no evidence to bear out defendant's claim that any further objection would have been futile.

Moreover, as we have noted, Dr. Resk was of the opinion that the cause of the victim's death was asphyxia from manual strangulation and he disagreed with Dr. Cooper's opinion that the victim died from aspirating stomach contents. Among other

things, Dr. Resk testified that Dr. Cooper "was incorrect" in discounting the medical significance of petechiae in the dura of the brain. In reaching his conclusion about the cause of death, Dr. Resk repeatedly relied on the report and the opinion of Dr. Masters who was also of the opinion that the victim's cause of death was asphyxia from manual strangulation. It was readily apparent that Dr. Resk's opinion was influenced by the reputation that Dr. Masters had in the medical community. Thus, it was proper for the trial court to allow Dr. Resk to explain why, in the court's words, Dr. Resk "place[d] great weight on Dr. Master's opinion because of his great respect for Dr. Masters personally" as opposed to agreeing with Dr. Cooper. This was not an improper vouching for the opinion of another expert; it was simply explaining why the other expert's opinion was an important component of Dr. Resk's conclusion regarding the cause of death.

We note also that other evidence also demonstrated Dr. Resk's strongly favorable views of Dr. Master. For example, Dr. Resk testified that he could "bank on" Dr. Masters' findings, and defendant raised no objection to this statement. Moreover, as the court pointed out, the high regard in which Dr. Resk held Dr. Masters "cut[] both ways" and might also have affected Dr. Resk's ability to assess Dr. Masters' work in a critical and impartial manner.

There was no error.

### III

#### *Photographic Evidence*

Over defendant's objections, the prosecutor introduced a photograph of the victim with one of her children. Defendant contends that this photograph should have been excluded because it was irrelevant and unduly prejudicial. We agree that the photograph should not have been admitted, but conclude that the error was harmless.

"Courts should be cautious . . . about admitting photographs of murder victims while alive, given the risk that the photograph will merely generate sympathy for the victims. [Citation.] But the possibility that a photograph will generate sympathy does not compel its exclusion if it is otherwise relevant. [Citation.] The decision to admit victim photographs falls within the trial court's discretion, and an appellate court will not disturb its ruling unless the prejudicial effect of the photographs clearly outweighs their probative value." (*People v. Harris* (2005) 37 Cal.4th 310, 331-332.)

The prosecutor sought to introduce a family photograph depicting the victim, her two children, and her father. Defendant objected under Evidence Code section 352, asserting the photograph was irrelevant to any issue at trial and likely to create undue sympathy.

The court ruled, "I am going to allow the photo. It represents a photograph of the deceased when she was alive. It's relatively recent, compared to the date of her demise."

However, the court ordered the prosecutor to edit the photograph to remove images of the victim's father and her newborn child because those images were "superfluous."

The prosecutor showed the cropped photograph to Peggy F., the victim's aunt, during her testimony. Defendant again objected, noting that there was no issue of identity, but the trial court permitted the photograph to be shown. Peggy identified the victim and her seven-year old daughter as the people in the photograph.

Defendant asserts that the photograph should have been excluded because it was irrelevant to any issues at trial. We agree. "There was no dispute as to the identity of the person killed--evidently the only issue on which the photograph was relevant--and therefore the photograph should have been excluded because it bore on no contested issue." (*People v. Hendricks* (1987) 43 Cal.3d 584, 594.) Neither the prosecution nor the trial court explained what possible probative value the photograph had, and we can think of none.

However, the error in admitting the photograph was harmless. The case against defendant was strong, and it is highly unlikely that the jury was swayed by sympathy rather than evidence that had been presented. It is not reasonably probable that a result more favorable to defendant would have resulted in the absence of error, and consequently reversal is not warranted. (See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1231.)

## IV

### *Refusal to Instruct on Involuntary Manslaughter Theory*

Involuntary manslaughter is an unlawful killing committed without an intent to kill and without conscious disregard for human life, and is a lesser included offense of murder. (*People v. Lewis* (2001) 25 Cal.4th 610, 645; CALCRIM No. 580.)

Involuntary manslaughter may be committed in two ways: "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Pen. Code, § 192, (b).)

In the present case, defendant sought instructions on both theories of involuntary manslaughter. First, he asserted he was entitled to an instruction on involuntary manslaughter based on the commission of a lawful act with criminal negligence because the evidence demonstrated that he might have negligently choked the victim too hard during a lawful act of sex. The trial court agreed and gave an instruction on this lesser included offense.

Second, defendant requested an instruction on involuntary manslaughter based on the commission of an unlawful act that posed a high risk of death or great bodily injury. Defendant pointed to the testimony of Dr. Cooper, who had opined that the victim's injuries were caused by a blow to the neck. Defendant argued that this evidence was sufficient to warrant an instruction on involuntary manslaughter based on the commission of an unlawful act.

The trial court refused to instruct on this theory of involuntary manslaughter. On appeal, defendant asserts that this decision was erroneous and compels reversal. We disagree.

"It is of course the rule that the court is under no duty to give a requested instruction when there is no substantial evidence in support." (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.) However, "a trial court errs if it fails to instruct . . . on all theories of a lesser included offense which find substantial support in the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "[T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is 'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the lesser offense, but not the greater, was committed." (*Ibid.*)

We agree with the trial court that there was no substantial evidence to support an instruction on involuntary manslaughter predicated on the commission of an unlawful act posing a high risk of death or great bodily injury. Defendant denied having a fight or argument with the victim. When asked whether it was possible that he touched or grabbed the victim around the neck or throat while having sex with her, defendant responded, "It's possible. I don't think that I--that I grabbed her hard enough to hurt her." Given this testimony, there is no evidence that

defendant committed an act that posed a high risk of death or great bodily injury, and therefore the requested instruction was properly refused.

Perhaps more importantly, although the defense pathologist believed a single blow to the victim's neck had been inflicted, he did not link this blow to the death of the victim. In fact, Dr. Cooper testified that this blow was *unrelated* to the cause of death, which he determined to be asphyxia from aspirating stomach contents.

Despite the lack of a causal link between any blow to the neck and the victim's death, defendant attempts to cobble together evidence to fit this theory by asserting that the jury could reasonably have believed (a) Dr. Cooper's testimony that a single blow to the neck occurred *and* (b) the testimony of the prosecution's witnesses that death occurred from the injuries to the neck. Under this scenario, the unlawful blow could have caused the victim's death.

Defendant mixes proverbial apples and oranges. The theories presented by opposing experts were separate and distinct and no trier of fact could reasonably have melded them together in the manner defendant suggests. The prosecution's expert witnesses believed that the cause of death was asphyxia associated with manual strangulation, not a blow, and they explained at length why they believed that strangulation had occurred. The defense expert testified that the victim died from aspirating stomach contents. There was no evidence the victim died from a blow to the neck, and therefore there was no

basis to instruct on the unlawful act theory of involuntary manslaughter.

In any event, the factual question posed by the omitted instructions was decided adversely to defendant under other properly given instructions.

The court instructed the jury that murder requires malice aforethought, that is, defendant intended to kill or knowingly committed an act dangerous to human life with conscious disregard for human life. (CALCRIM No. 520.) The court contrasted this situation with involuntary manslaughter, a crime that occurs without malice aforethought, "[w]hen a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life." (CALCRIM No. 580; Pen. Code § 192, subd. (b).)

In convicting defendant of second degree murder, the jury necessarily found that defendant acted with malice aforethought. That finding made a verdict on a lesser included offense of involuntary manslaughter impossible. By definition, involuntary manslaughter involves the *absence* of malice. Any error in failing to instruct on the full range of involuntary manslaughter theories was therefore harmless. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 646; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 21-22; *People v. Polley* (1983) 147 Cal.App.3d 1088, 1091-1092.)

V

*Cumulative Error*

Defendant contends that the cumulative effect of the claimed evidentiary errors compels reversal. We do not agree.

The jury's verdicts reflected the strong case against defendant. We are confident that, had the trial court not made the evidentiary rulings that defendant's claims were error, the jury's verdict would nonetheless have been the same. (*People v. Chatman* (2006) 38 Cal.4th 344, 410.)

DISPOSITION

The judgment is affirmed.

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HULL, J.

We concur:

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SCOTLAND, P. J.

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SIMS, J.